No. 14,922

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE DUSHON, HAROLD RATHGEB, HILTON DUKE, PETER J. VALLENTINE, NELS PILSKOG, JOE MISZENCIN and THOMAS J. GOLDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

REPLY BRIEF OF APPELLANTS.

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I.

JURISDICTION.

On pages 1 and 2 of Appellee's brief, statutes are cited "in amplification of the appellants' jurisdictional statement".

None of these cited statutes, except 28 U.S.C.A. 1346(b), pertain to the jurisdiction of the District Court for the Territory of Alaska to try the plaintiffs' case.

The trial Court had jurisdiction solely by virtue of the provisions of 28 U.S.C.A. 1346(b).

II.

QUESTION INVOLVED.

The only question involved in this appeal is as stated in appellants' brief:

"Whether or not Harold D. Greene, who was operating a track car with trailers connected, was, at the time of the collision, acting in the capacity of an 'employee of the government' as the term is used in Section 1346 (b) of New Title 28 U. S. Code, and as the term is defined in Section 2671 thereof." (Brief of Appellants, III, pages 12, 13.)

III.

SPECIFICATIONS OF ERROR.

In accordance with Rule 18-2 (d), counsel for appellants have urged no error other than those set out in our specifications of error, in which the findings of the trial Court are specified as error.

As required by the Rule we have stated, as "particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous." (Appellant's Brief IV, pages 13-14.)

IV.

DEFINITIONS.

"Federal agency", as defined in Sec. 2671, New Title 28, U. S. Code, includes the Alaska Railroad, but does not include any contractor with the United States.

"Employee of the government" as defined in the same section includes employees of any Federal agency.

The word "employee" is not defined.

V.

ARGUMENT.

A.

DEFINITION OF THE WORD "EMPLOYEE".

The argument of the United States Attorney is based upon the assumption that the word "employee" means a person hired, paid, and subject to discharge, by another.

The United States Attorney has not cited a single authority sustaining this assumption.

On the contrary, in our opening brief, we have cited Federal cases holding that the really essential element in determining the relation of master and servant is the right of control.

Matcovich v. Anglim, 134 Fed. (2d) 834. (Appellants' Brief, page 19.)

State of Maryland v. Manor Real Estate and Trust Co. et al., 176 Fed. (2d) 414, Opinion 8. (Appellants' Brief, page 20.)

Denton v. Yazoo & M. V. R. Co., et al., 284 U.S. 305, is also to the same effect.

B.

AUTHORITIES CITED BY APPELLEE.

Numerous decisions having to do with the relationship of an independent contractor and his contractee are cited and reviewed in the brief of appellee. The responsibility or non-responsibility of the contractee for injuries suffered by the employee of the independent contractor, all depending on the terms of the contract, are not relevant in this case, and none of the authorities cited are in point, but none of the cases cited by appellee repudiated, and nearly all recognized, the principle that right of control is determinative of whether or not the relationship of master and servant exists.

United States v. Sharpe, et al., 189 F. (2d) 239-242, is strongly relied upon in appellee's brief.

In that case, the Fourth Circuit reversed the decision of the trial judge, and held that liability could not be imposed on the master for the negligence of the servant in the operation of an automobile for the servant's purpose.

Discussing the doctrine, *respondeat superior,* the Court, on page 242 of the opinion, quotes with approval the following:

> "This doctrine applies only when the relation of master and servant is shown to exist between the

> wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose."

At the very time, and in respect to the very transaction out of which plaintiffs' injuries arose, Harold D. Greene, the wrongdoer, whose negligence caused the collision, was subject to the control of the Alaska Railroad, a Federal agent of the defendant United States. Morrison-Knudsen could not tell him when to use the tracks of the Alaska Railroad; they could tell him where to go and for what purpose. They could not tell him, were not competent to tell him, and had no authority to tell him, how to operate the track car.

The relationship of master and servant did not and could not have existed between Morrison-Knudsen and Greene with respect to the manner in which he should operate the track car.

On the other hand, in his operation of the track car Greene, using the tracks of the Alaska Railroad with its permission, was subject, when using them, to their rules and regulations.

He was subject to the control of the management of the Alaska Railroad, of experienced and competent railroad men, else they would not have been employed by the United States to manage the railroad.

The relationship of master and servant did exist between the Alaska Railroad and Greene with respect to the manner in which he should operate the track car.

C.

THE FACTS.

The facts of this case are accurately stated in appellants' statement of the case, par. II, pages 2-12.

No material statement therein is disputed in the brief of appellee.

It is established that Harold D. Greene was under the control of the Alaska Railroad in his operation of the track car.

D.

THE LAW.

The law is exhaustively argued in appellants' brief, par. V, pages 15-34.

Counsel for appellants are not attempting to strain the meaning of the word "employee" to meet the exigencies of the occasion in order to invoke the remedy afforded by the Tort Claims Act.

If we were bound by the narrow definition applied by the United States Attorney, this action would never have been brought, but it has been demonstrated by unanimous authorities cited by appellants that, in all cases where the liability of the master for the tortious acts of the servant is involved, the question involved is who had the right of control.

E.

RAILROADING HAZARDOUS.

That railroading is a hazardous operation has uniformly been held by Court decisions and declared by state statutes.

The case of *Missouri Railway Co. v. Mackey,* 127 U.S. 205, holds:

> "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories. See Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 523; Barbier v. Connolly, 113 U.S. 27; Soon Hing v. Crowley, 113 U.S. 703."

See also:

In re Brown, 159 N.Y.S. 1047;

Sullivan v. Atlantic Coast Line R. Co., 244 Fed. 606.

Notwithstanding the many safety devices, such as block signal systems, air-brakes, etc., which have been

invented and applied in recent years, railroading has continued to be hazardous. Safety precautions have not kept pace with accidents. Safety has been sacrificed to speed.

In the brief of appellee, pages 16-17, the case of *Dalehite v. U. S.,* 346 U.S. 15, is cited to the effect that liability does not arise by virtue of the United States engaging in an "extra hazardous activity".

This principle has never been disputed by appellants. We have never contended that the United States is liable in this case for any other reason than that the injuries suffered by appellants were caused by the negligence of an employee of the United States, while, with the permission of the Alaska Railroad, using its tracks.

On page 25 of appellee's brief, it is stated:

> ". . . The Federal Tort Claims Act requires a negligent act or omission of a Federal employee. This law is in derogation of sovereign immunity and should be strictly construed against the appellants . . ."

The *Dalehite* case is again cited by appellee in support of the foregoing statement.

Evidently the United States Attorney is not aware that the *Dalehite* decision was reversed on January 28, 1957, by the Supreme Court of the United States.

> *Rayonier Incorporated, a Corporation, Petitioner v. United States of America; Arthur A. Arnhold, et al., Petitioners v. United States of America,* Nos. 45, 47.

The case is reported in 77 Supreme Court Reporter, pages 374-378, 352 U.S. .....

In his opinion on page 377, Justice Black states:

"(3, 4) It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability . . ."

VI.

CONCLUSION.

1. In our specifications of error, the counsel for appellants have abandoned all the allegations of the complaint ascribing negligence to the defendant United States, except the allegation that the injuries suffered by appellants were caused by the negligence of an employee of the United States, one Harold D. Greene.

We have waived the allegations that the Alaska Railroad used a slip-shod method of giving information of train movements; that it had a defective air-brake system; that it was not equipped with modern safety devices, and the like.

2. There is but one question for this Appellate Court to decide, and that is whether or not Harold D. Greene was an employee of the defendant United

States at the time of the collision which caused the injuries of plaintiffs.

Appellants contend that he was, and support that contention by judicial decisions.

Appellee contends that he was not, and supports its contention by assertion.

Throughout the brief of appellee, the United States Attorney repeatedly begs the question.

In one assertion, the United States Attorney hits the nail on the head. On page 18 of his brief he states:

> ". . . It is obvious that the simplest precaution taken by Greene, e.g., flagging around the curve on which the collision occurred, would have prevented the collision."

Greene knew the Alaska Railroad train was in the vicinity, but thought he had time to beat it past the curve.

He was in a hurry.

3. In par. IV, page 7 of appellee's brief, it is stated that "appellants attempt to reach this conclusion by some undemonstrable alchemy based on non-delegable duty under a railroad franchise," etc.

Perhaps we have been guilty of something of that sort. However, no alchemist wrote the brief of appellants.

We have attempted, not by undemonstrable alchemy, but by diligent legal research, to reach our conclusions.

It is submitted that the decision of the trial Court should be reversed.

Dated, Anchorage, Alaska,
March 11, 1957.

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